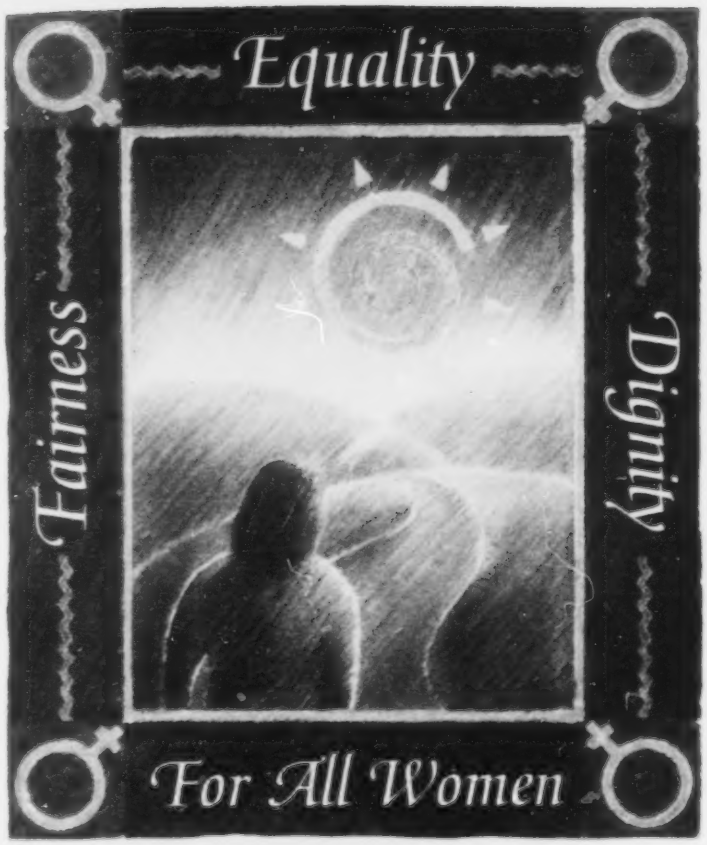
RESPONSE TO BILL C-22

AN ACT TO AMEND THE DIVORCE ACT

August 2003



The Journey Continues ...

Nova Scotia Advisory Council on The Status of Women

Conseil consultatif sur la condition féminine de la Nouvelle-Écosse

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RESPONSE TO BILL C-22

AN ACT TO AMEND THE DIVORCE ACT

August 2003

Nova Scotia
Advisory Council on
the Status of Women

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Advancing equality, fairness & dignity for all women in Nova Scotia

The **Nova Scotia Advisory Council on the Status of Women** was established by provincial statute in 1977. The Council's mandate under the *Advisory Council on the Status of Women Act* is to advise the Minister Responsible for the Status of Women and to bring forward the concerns of women in Nova Scotia.

The Council's work touches on all areas of women's lives, including:

- family life
- economic security
- legal rights
- sexuality
- health
- education
- paid & unpaid work
- violence

Council works toward the inclusion of women who face barriers to full equality because of race, age, language, class, ethnicity, religion, disability, sexual orientation, or various forms of family status.

We are committed to voicing women's concerns to government and the community through policy research, information services, and community outreach.

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RESPONSE TO BILL C-22

AN ACT TO AMEND THE DIVORCE ACT

INTRODUCTION

The Nova Scotia Advisory Council on the Status of Women is pleased to present this brief to the Standing Committee on Justice and Human Rights on Bill C-22, An Act to amend the Divorce Act.

The mission of the Nova Scotia Advisory Council on the Status of Women is to advance equality, fairness and dignity for all women. We are submitting this brief because we believe that the proposed changes to Divorce Act will inevitably affect the status of Nova Scotian women and children affected by divorce.

This is the third brief that we have submitted to various federal government bodies on issues related to the Divorce Act. In May 1998, we submitted a brief to the Special Joint Committee on Child Custody and Access Reform and in June 2001 we submitted a brief in response to the Federal/Provincial/Territorial Consultation on Divorce Act Reform. In transmitting this brief to the Clerk of the Standing Committee, we have also re-submitted these earlier briefs for reference.

We are indebted to the National Association for Women and the Law for their excellent research on Bill C-22 and for their generosity in allowing us to borrow liberally from their Brief. The views expressed and the recommendations in this Brief, however, are entirely those of the Nova Scotia Advisory Council on the Status of Women.

Overview and Summary of Recommendations

We are pleased that there are several positive elements in the proposed Act, including better criteria to determine the best interests of the child and that these criteria include risks to their security and well-being associated with family violence. We are perturbed, however, that the reference to family violence is gender neutral with no mention of the prevalence of violence against women and that it is not proposed to take into account the impact of violence on the mother specifically in determining the best interests of the child.

We are also pleased that the focus has shifted away from "rights" in favour of parental responsibilities towards children, but we are sceptical, at best, that abandoning the language of custody in the new Act in favour of an unspecified and de-contextualized concept of 'parental responsibilities' will help to resolve post-divorce conflict and litigation.

Moreover, the model presented in Bill C-22 lends itself to a default presumption of joint parental responsibility until there is a specific parenting order directing otherwise. According to one expert, under this model, "parenting responsibility would be jointly held by both parents, and would remain so until an order or agreement provides otherwise."[1] In countries that have introduced a parental responsibilities model, such as Australia and the UK, as well as many American states, research indicates that judges, lawyers and other family law professionals have gradually adopted a de facto presumption in favour of shared parenting[2]. While shared parenting can be a good arrangement for parents who are able to cooperate, who are equally committed to providing care for the child and who both agree that shared parenting or joint custody would be in the best interests of the child, it is definitely not appropriate in all situations, especially high conflict divorces or situations where there has been a history of abuse of power and/or violence.

We also believe that the lack of reference to prevailing gender roles in primary care and to the realities that this involves, especially for mothers, will, in the context of how 'parenting time' and 'decision-making' are defined, make the exercise of parental responsibilities and daily care extremely difficult, especially in situations where there has been a history of abuse or control. There appear to be no specific criteria related to the residence of the child(ren) in determining parenting orders or links made between residence, parental responsibility and decision-making. These issues raise questions about whether, in practice, these concepts will also open the door to increased uncertainty and instability for children.

The federal government's overall policy framework within which Bill C-22 has been introduced is heavily biased in favour of mediation and parenting plans, but there is no commitment to increase federal funding for family law matters, legal aid or for community based agencies which address women's issues and whose services are likely to be in increased demand once the Act comes into effect. This raises serious concerns about women's access to the mechanisms of justice.

In keeping with previous commitments by the federal government to women's equality and to conduct gender based analysis of all federal policies and program, we also call for a gender-based analysis of the impact of the Divorce Act on women's equality, with reports to parliament on an annual basis.

Given these concerns, our recommendations cover four areas: 1) Clarification of conditions of parental responsibility, taking primary care-giving and the safety of women and children into account; 2) Taking fuller account of the safety and security of both mothers and their children in the best interests of the child test; 3) Improving women's access to justice in the context of new family court practices of conciliation and mediation; 4) Ensuring government accountability for the impact of the Act on women.

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[1] Cossman, p. 95.

[2] Helen Rhoades, Reg Graycar, and Margaret Harrison, (2000) The Family Law Reform Act 1995: The First Three Years, Sydney, University of Sydney and Family Court of Australia; Rebecca Bailey-Harris, Jacqueline Barron and Julia Pearce, "From Utility to Rights? The Presumption of Contact in Practice" (1999) 13 International Journal of Law, Policy and the Family 111-131.

RECOMMENDATIONS:

I Clarify conditions of parental responsibility, taking primary care-giving and the safety of women and children into account:

If the Committee decides to replace the language of custody and access with the concept of parental responsibility:

1- The *Act* will need to provide better guidance as to where a child will actually reside, taking into account the history of caregiving and a child's need for stability;

2- Previous primary caregiving and parenting responsibilities and the best interests of the child must be recognized in assigning residence, parenting time and decision-making responsibilities;

3- In cases where there has been abuse or violence, actual parental responsibilities and history of caregiving must be tied to decision-making responsibilities to prevent abusive fathers from maintaining rigid decision-making control while abdicating any actual caregiving responsibilities;

4- The *Act* should find ways to actively discourage the Court's interference in defining the minutiae of daily living in Court orders related to parenting time, decision-making and parenting responsibilities

5- The *Act* will need to identify how "supervised parenting" is to be ordered and exercised, taking into account the great variability of resources in rural and urban settings;

6- Specific provisions must be added so that shared decision-making responsibilities would not jeopardize an abused woman's safety interests;

7- The Bill needs to address the dissonance that will exist between the child support guidelines and the *Divorce Act;*

8- Provisions will need to be made to better protect children from international kidnappings.

II Improve the best interest of the child test

9- Section 16.2 of the *Divorce Act* should specify that the issues of safety and security of both the child and her primary caregiver are the paramount concern when deciding on a child's best interests.

10- The circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-

making responsibility for the abuser in cases involving family violence must be added to the subsection 16.2 (1) (d).

11-The definition of family violence in subsection 16.2 (3) should specifically mention wife assault or spousal violence, and include "sexual abuse" as well as "psychological abuse," when it entails a prolonged pattern of behaviour intended to control the victim through humiliation, fear or isolation.

12- The provisions on family violence should also identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as is the case in New Zealand and as recently recommended by the B.C. Institute Against Family Violence[3]. In cases involving family violence and where contact with the abuser is still considered in the best interests of the child, supervised access or visits must be provided, and the courts should monitor the protection of the best interests of the child during the supervised contact periods.

13- Supervised access services must be accessible, secure and provided by those with expertise in child abuse and violence against women. Services must be racially, culturally and linguistically appropriate to the diverse families across Canada. The difficulties of providing and organizing supervised access in rural and remote areas of Canada must be recognized and consideration given to providing special funding to the Provinces and Territories to cover the costs of this.

14-The proposed subsection 16.2(2)(e) must be amended to include race and ethnic origin in the list of factors to be taken into consideration to determine the best interests of the child.

15-The reference to Aboriginal heritage should appear in its own paragraph, and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples, the equality rights of Aboriginal women, as well as the best interests of the specific child who is affected by a decision.

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[3] The BC Institute Against Family Violence recommends that risk factors include: "the nature and seriousness of the violence used; how recently the violence occurred; the frequency of the violence; the likelihood of further violence occurring; the physical or emotional harm caused to the child by the violence; whether the other party to the proceedings considers that the child will be safe while the violence party has custody of or access to the child and consents to the violence party having custody or access (other than supervised access) to the child; the wishes of the child, if the child is able to express them, and having regard to the age and maturity of the child; any steps taken by the violent party to prevent further violence occurring; such other matters as the Court considers relevant." Excerpt from Position Statement 2, BC Institute Against Family Violence, March 11, 2003.

III Ensure women's access to justice

16- Mediation must never be mandatory. Where a woman discloses past abuse/control issues, she should not be expected to begin or continue with mediation. A screening mechanism, similar to that which has been adopted in the Nova Scotia Supreme Court Family Division, should be provided to identify cases where there is violence or concern about the safety or the emotional, psychological or physical health of the parties. Mediation should also not be recommended as a form of therapeutic intervention for so-called "high conflict" family law disputes. Participation in mediation or similar alternative dispute resolution process should not be a requirement for receiving legal aid or any community support services related to family law issues.

17- The Divorce Act should continue to recognize that both parties in divorce have a constitutional right to legal information and advocacy by trained lawyers throughout the process if they wish it.

18- Legal aid should be granted to qualified persons where there has been/is the threat of domestic violence. Alternative methods of delivering legal services to women who fall above the current income threshold for legal aid should be investigated, including loans and long-term payment options. Staff involved with legal aid clients and unrepresented litigants should be trained in domestic violence issues.

19- The Federal government must provide adequate funding for legal aid to the Provinces and Territories for family law matters and must ensure that provinces and territories use this money as intended.

20- Family court personnel, lawyers, mediators and other professionals involved in or advising on ADR processes, parent education or child assessments must receive mandatory training in the new legislation that also includes training on the realities and dynamics of family violence and its affects on women and children.

21- The National Judicial Institute should be encouraged and supported in delivering appropriate educational programs and resources to the judiciary on the Divorce Act, and the many associated issues referenced above.

22- The Federal government must invest more than is currently planned in support services in family law, the training of legal and family court professionals and the development of screening and other tools related to family violence, as well as for agencies providing safety planning and family court support for women.

IV Ensure government accountability for the impact of the Act on women

23- A specific provision should be included mandating an annual report to Parliament on the application of the *Divorce Act* that specifically directs the Department of Justice to conduct a gender-based analysis of the impact of the Act on women.

I CONDITIONS PERTAINING TO PARENTAL RESPONSIBILITY SHOULD BE CLARIFIED

Gendered care-giving and the reality of parenting responsibilities

The terms custody and access are to be replaced by the concept of "parental responsibility", but this key concept is not defined in Bill C-22. In principle, the concept that both parents have ongoing responsibilities towards their children is unquestionably a good one, but parenting patterns can't be changed by legislation alone. The problem with defining parental responsibility is that most of the actual work of good parenting is invisible. Because women are usually the primary caregiver, the work of mothering is often taken for granted and is only noticed in its absence . . . or when it is done by a man. The adequate exercise of parenting responsibilities by women and men is still defined by gendered and sexist expectations and standards.

As social science studies indicate[4], too many fathers still believe that the primary care of children is the responsibility of women, and it is still women who in most cases do the majority of housework, provide most of the day to day care for the children, who arrange their work schedules to accommodate their children's needs and who take time off from work to care for sick children[5]. These gendered patterns of caregiving are deeply ingrained and prevail both during marriage and after divorce. Indeed, reports commissioned for the Department of Justice show that, after divorce, a majority of fathers do not share equally in parental responsibility for their children even when they have joint custody, and that mothers often end up doing most of the caregiving work [6]. In fact, many women must now also ensure that their children have what they need (sufficient clothing, toys, books, even food) when they are in the care of their fathers.

A Bill that directs attention to the needs of children and seeks to achieve more responsible parental involvement from fathers should be a positive step. Unfortunately, without systemic social change related to men's ability and willingness to provide care, in workplace culture, and in the economic consequences of caring for a child, a simple change of language in the *Divorce Act*, will not achieve the goal of ensuring that both parents share parental responsibilities equally.[7]

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[4] Katherine Marshall (1993) *Les parents occupés et le partage des travaux domestiques,* Perspectives, Statistics Canada. Cat. 75-001F, p 28

[5] Statistics Canada, The Daily, Tuesday February 11, 2003

[6] Nicole Marcil-Gratton and Céline Le Bourdais, Custody, Access and Child Support: *Findings from the National Longitudinal Study of Children and Youth*, Université de Montréal, Institut national de la recherche scientifique, Presented to the Child Support Team, Department of Justice Canada, 1999, at p. 21: "Interestingly, most children for whom parents said there was a court order for shared custody in fact lived only with their mothers at the time of separation".

[7] Rhoades, Graycar and Harrison, *supra* note 2; Boyd, *Child Custody, Law, and Women's Work* (Toronto: OUP Press, 2003), chs. 7-8.

Studies indicate that in those countries that have adopted parental responsibility models (England, Australia and many states in the U.S.) the introduction of the concept of parental responsibility has done very little to actually change ingrained parenting patterns.[8] Legislation that would create the illusion of shared parental responsibilities and modify parental authority accordingly, while at the same time being unable to actually change parenting patterns, will cause more harm than good.

Reference to residence of child(ren)

The concept of "parenting time" is entirely new, not only in Canadian family law, but also in Common Law. Indeed, in the many jurisdictions that have adopted a parental responsibilities model, none have adopted the language of "parenting time". Most refer to "residential parent" and "contact parent". However, Bill C-22 does not refer to the child's residence, primary or otherwise. This is problematic: where a child will eat supper, do her homework, have her bath and sleep at night are the most basic questions, and the answers to them will not be clear under the proposed reform. Will both parents who have parenting time be required to have a complete home for the child? Will children of divorce now all have two homes, or will they effectively become "homeless"? Or is this Bill simply assuming that regardless of any legal status, someone--usually the mother, will always be there to provide clothing, food and shelter for the child? If a change of language is considered necessary, why does the Department of Justice not adopt language used in other jurisdictions, such as "residence" and "contact" ?[9]

The enforcement of parenting agreements

The new terminology also raises concerns about the enforcement of parenting agreements and parenting orders. What will happen when a parent does not bring a child back to the other parent or does not make sure that a child is given her medicine? How can the other parent intervene to protect the best interests of the child? It is sometimes necessary to involve the police when an order is breached. Currently, the police are already reluctant to enforce these orders, claiming they are unclear or that the police have no jurisdiction. The new terminology will only make enforcement more difficult.

Fathers' rights groups have argued that the *Divorce Act* needs to be amended to protect fathers from unfair access denial. However, most mothers would welcome increased parental involvement from fathers after a divorce, on the condition that it does not threaten their children's well-being or security[10]. Indeed, reports commissioned for the Department of Justice show that, in fact, "failure to exercise access appears to be much

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[8] It is important to note that even in jurisdictions which use this language, litigation has increased, including post-order litigation about contact. See Rhoades, supra note 2.

[9] Rhoades, *supra* note 2

[10] Debra Perry et al., *Access to Children Following Parental Relationship Breakdown in Alberta* (Calgary: Canadian Research Institute for Law and the Family, 1992), at 37 et seq.. Linda Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 *Windsor Yearbook of Access to Justice* 115, at 142-3.

more prevalent than access denial or unwarranted access denial[11]. Another study shows that, after divorce, a majority of fathers do not comply with child visitation commitments.[12] When mothers do prevent access it is typically out of concern for the safety and well being of the children at a particular moment. The Lisa Dillman case is an example.[13] Where custodial parents deny legitimate access without reason, there are adequate remedies already in place within both the family and criminal courts.

The notion of parental responsibility is also potentially imbued with problematic expectations as to what constitutes adequate or good parenting. These expectations may be based on the standards and prejudices held by those involved in decision-making – mediators, assessors, lawyers and judges. For instance, some judges may automatically assume that it is in a child's best interests to reside with the parent with greater material wealth, or with a heterosexual parent rather than a lesbian mother. Others may assume that a mother with disabilities is unable to care for her child adequately. While the best interests of the child test and basic human rights standards provide a guide for defining the boundaries of adequate parental responsibility, crafting a specific definition of parental responsibility remains a challenge. Replacing the notions of custody and access with parental responsibility will introduce confusion and uncertainty and will not help families resolve difficult disputes.

Primary care and decision-making

Bill C-22 also introduces a separation between the responsibility for the primary care of a child and the responsibility for making decisions that relate to the child. This type of decision-making responsibility is broken down into three categories under the proposed subsection 16(5): the responsibilities for making major decisions with respect to the child's health care, education and religious upbringing; the responsibility for making decisions relating to a specific matter affecting the child; and the responsibility for making decisions affecting the child other than those provided for above.

Nothing in this proposed model would prevent a scenario where a mother would have 80 per cent of all parenting time (and parenting responsibility), but the father would have equal decision-making authority. In particular, there could be a great deal of confusion and overlap between the areas of decision-making identified in subsection 16(5)(d), which refers to the responsibilities for making decisions affecting the child "other

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[11] Pauline O'Connor, *Child Access in Canada: Legal Approaches and Program Supports*", presented to Family, Children and Youth Section, Justice Canada, 2002-FCY-6E, at p. 9.

[12] Nicole Marcil-Gratton and Celine Le Bourdais, Custody, Access and Child Support: Findings from the National Longitudinal Study of Children and Youth, , loc. cit., note 5, at p. 22; See also Christin Schmitz, "Denial of child access not the main problem: CBA", *The Lawyers Weekly*, vol. 18, no. 4, May 29, 1998, pp. 7, 29. .

[13] In this case, the mother of two young girls fought to prevent court-ordered visits by the girls with their imprisoned, sex-offender father, who had been convicted of sexually assaulting their step sister as well as other women. She was at one stage found in contempt of court for not abiding by the access orders. Deborah Tetley, "Daughters Stop Visit to Imprisoned Father", *Calgary Herald*, 28 May 2001; *Schneeberger* v. *Schneeberger*, [1999] S.J. No. 817 (Sask. C.A.), (Q.L.). See also: Susan B. Boyd, *Child Custody, Law, and Women's Work* (Toronto: Oxford University Press, 2003), 136.

than those provided for under subsection 16 (5) b) and c)" [14] and "the day-to-day" decision-making authority granted to the parent who is exercising parenting time. Again, it can be expected that in certain circumstances, extensive litigation will be required to delineate these different types of decisions.

The model also raises the possibility that a mother who is providing day-to-day primary care to her children would have to consult with their father every time she needs to make any kind of decisions affecting the child. This is unwieldy, frustrating and counterproductive for all parties, including the children. It is also antithetical to most people's understanding of what it means to be "divorced" or "separated." Where two people have separated or divorced, even if this is just because their lives have progressed in different directions, it is unusual for them to be able to collaborate and cooperate closely for many years on the minutiae of daily living, which is exactly what is required by what appears to be simply a modified shared parenting or "parallel parenting" models. Where the separation or divorce follows an abusive relationship, it is not only unusual but could be dangerous.

Women's vulnerability to control and the increased risk of violence

If badly interpreted, the proposed provisions on decision-making authority could lead to situations where women are once again subjected to marital authority and control, despite the fact that they are divorced. For an abuser, decision-making authority often provides the foundation to continue exercising control--to prevent their ex-partners from becoming independent and to ensure that they remain connected with them. Decisions made by someone who is involved for reasons of power and control and not out of genuine interest in the children will more likely reflect the decision-maker's interests than those of the children. They will certainly not reflect the concerns of the mother, and they could jeopardize her security as well as that of the children.

While the proposed criteria defining the best interests of the child do direct a judge to take into consideration the safety of the child and "other family members" in making a parenting order, this gender neutral language is not sufficient. Women are almost three times as likely as men to report the most serious forms of violence, with an elevated risk of violence during marital breakdown and separation, including the risk of being killed.[15] Specific provisions must be included and operational supports must be strengthened to encourage judges not to order shared parenting time, shared decision-making responsibilities or other forms of decision-making that would jeopardize an abused woman's or a child's safety interests.

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[14] par 16 (5) b) refers to decisions relating to a child's health care, education and religious upbringing, and par. c) refers to decisions relating to the responsibility for making decisions relating to a specific matter affecting the child.

[15] Federal-Provincial-Territorial Ministers Responsible for the Status of Women, Assessing Violence Against Women: A Statistical Profile, 2002.

Parenting time and supervised access

The present laws on custody and access provide for "supervised access" when a parent has abused a child or risks harming the child. Would such a parent still benefit from the presumption set out in subsection 16(8) that parenting time also carries the exclusive responsibility for day-to-day decision-making? Will the new concept of parenting time allow for "supervised parenting", and if so, how would this be done?

The potential of a negative impact on child support payments

The Child Support Guidelines are structured around the notion of "custody and access". Indeed, the calculation of child support awards is based on the income of the "non-custodial" parent (except in Québec, where different rules apply). If the language of custody and access is abandoned, there will be more uncertainty about how the guidelines will apply. Indeed, with the proposed notion of "parenting time" and in the absence of a determination of residence, it may be difficult to identify a residential parent or a primary caregiver parent. We question whether this is in the best interests of the child.

It is almost certain, however, that even more litigation will follow the passing of Bill C-22 if this aspect of the Bill remains unchanged, since it will allow for the recalculation of child support payments "at the request of either or both spouses", on the basis of updated income information. In addition, the Bill would make it easier for an ex-spouse to engage in inter-provincial proceedings to vary, rescind or suspend support orders without notice to the other spouse (section 18(2). Indeed, one has to wonder whether the opportunity of varying child support payments has not been a motivating factor behind the fathers' rights lobby for shared parenting. With the changes proposed in Bill C-22, mothers receiving child support are likely to have to deal with more, nor fewer, judicial proceedings in a context where legal aid and advocacy services have been drastically reduced in many provinces.

The weakening of international kidnapping provisions

Another complication that will result from the proposed Bill will be the difficulty of using international treaties that still employ the language of custody and access. In particular, the Convention on the Civil Aspects of International Child Abduction (The Hague Convention) refers to custody and access, not "parenting time". Bill C-22 proposes that a parenting order "may" refer to the Hague Convention in order to define who is deemed to have "custody or rights of access" for the purposes of that treaty. The Bill further provides that if the court is silent on the issue, each person to whom parenting time has been allocated "is deemed to have rights of custody for the purposes of that Convention" (ss. 22.1(2)). This implies that unless there is a specific reference stating which parent has "custody" for the purposes of the Hague Convention, both parents will be presumed to have joint custody as long as they have at least some "parenting time" with the child. This would certainly make it more difficult to limit international kidnappings. Inasmuch as it is immigrant women who most often (although not exclusively) have to deal with international kidnapping, this might increase the already disadvantaged position that immigrants face (especially those who are also women of Colour) in law and in society.

RECOMMENDATIONS:

Clarify conditions of parental responsibility, taking primary care-giving and the safety of women and children into account:

If the Committee decides to replace the language of custody and access with the concept of parental responsibility:

1- The *Act* will need to provide better guidance as to where a child will actually reside, taking into account the history of caregiving and a child's need for stability;

2- Previous primary caregiving and parenting responsibilities and the best interests of the child must be recognized in assigning residence, parenting time and decision-making responsibilities;

3- In cases where there has been abuse or violence, actual parental responsibilities and history of caregiving must be tied to decision-making responsibilities to prevent abusive fathers from maintaining rigid decision-making control while abdicating any actual caregiving responsibilities;

4- The *Act* should find ways to actively discourage the Court's interference in defining the minutiae of daily living in court order related to parenting time, decision-making and parenting responsibilities

5- The *Act* will need to identify how "supervised parenting" is to be ordered and exercised, taking into account the great variability of resources in rural and urban settings;

6- Specific provisions must be added so that shared decision-making responsibilities would not jeopardize an abused woman's safety interests;

7- The Bill needs to address the dissonance that will exist between the child support guidelines and the *Divorce Act;*

8- Provisions will need to be made to better protect children from international kidnappings.

II IMPROVE THE DEFINITION OF THE BEST INTERESTS OF THE CHILD TEST

The introduction of criteria in this Bill (section 16.2) to assist judges and others in considering the best interests of the child is a significant positive initiative that we support. Indeed, criteria can reduce confusion and assist judges, lawyers, mediators, court staff and parents themselves in considering appropriate factors in custody and access cases.

Elimination of the maximum contact presumption

The maximum contact presumption now contained in subsection 16(10) of the current Divorce Act would be eliminated with Bill C-22. This is a very important change. Many experts have noted the serious problems caused by this presumption, most glaringly exemplified by the Lisa Dillman case.[16] While the proposed subsection 16.2(2) b) would still direct judges to look at the "benefit to the child of developing and maintaining meaningful relationships with both spouses", we hope that courts will not interpret this provision to enforce contact between children and their abusive fathers, as was often done under subsection16(10).

Stability and the history of care

The law must remain focussed on the stability needs of the children. This factor, reflected in Section 16.2(c), therefore, is of utmost importance. Given the fact that mothers provide the majority of care most of the time, both before and after separation, a legal presumption that parents would share equally in the care of the children would result in a significant change in the status quo for many children. For children, the upheaval associated with the separation of their parents is sufficient without adding to it any significant change in their daily routines or their primary caregiver. Unless important reasons exist to justify a change, the Court should be encouraged to make parenting orders on a case-by-case basis, unlimited by any presumptions, so that they reflect the ongoing parenting arrangements within each family. Whichever parent provided most of the care prior to separation should continue to provide most of the care after separation. Care should be examined globally and should not be a mere totalling of minutes spent in the presence of the children, in order to accurately reflect who is taking the responsibility for child-related planning as well as the day to day physical care of the children. This principle has recently been endorsed by the American Law Institute, which has adopted the "Approximation Rule", by which parenting after divorce is determined on the basis of the amount of time a child has spent in the care of each parent prior to separation[17]. This principle truly reflects and respects the needs of children.

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[16] Jonathan Cohen & Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 Canadian Family Law Quarterly 121.

[17] Katherine Bartlett, "Improving the Law Relating to Postdivorce Arrangements for Children", in Ross A. Thompson and Paul R Amato, eds, *The Postdivorce Family: Children, Parenting, and Society*, Thousand Oaks, CA: Sage Publications, 1999, 71-102.

Exposure of Children to Family violence

Violence against women has serious consequences for children exposed to it. The behaviour and attitudes of an abusive man can have a profound and lasting destructive impact on the children's well being that will continue with ongoing post-separation contact[18]. In addition, the ongoing exposure of the mother to her abuser because of a custody order will have a negative impact not only on her safety and equality interests, but on the children's well being. It is imperative that these realities be a legislated consideration when decisions about post-separation parenting are being made, and that the safety of the abused parent and of the children be acknowledged as a paramount consideration.

Bill C-22 proposes to include "family violence" as a factor in the determination of the best interests of the child (section 16.2(d)). However, the definition does not go far enough in identifying the many kinds of violence that women experience at the hands of abusive spouses. Indeed, the definition refers exclusively to physical violence. This definition is too narrow and does not include other very damaging expressions of male violence such as sexual and psychological abuse. Failure to consider all of the tactics used to maintain power and control over women in a relationship will ultimately fail both mothers and children and put them at risk of further harm.

Another weakness of the proposed criterion is that it fails to identify wife assault as a specific and significant element of "family violence." Specific focus needs to be placed on male violence against women. The generic reference to "family" violence without any mention of wife assault or spousal violence will side-track efforts at understanding this manifestation of historically unequal relations between men and women in the family, and the threat that it represents to the well-being of children.

The provisions on family violence should identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as recommended by the B.C. Institute Against Family Violence[19]. We also endorse the Institute's recommendations that the circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-making responsibility in cases involving family violence must be added to the provisions. Supervised access or visits must be provided for in cases involving family violence, and the courts should monitor the protection of the best interests of the child during a supervised contact period.

Race and culture

Because of systemic racism, poverty, a lack of access to services and other social barriers, many women face increased challenges in family court. Judges and lawyers may have biases and prejudices about certain cultures and religions and hold a negative opinion

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[18] For an extensive review of the literature on this subject, see Peter Jaffe, Nancy Lemon, Samantha Poisson, *Child Custody and Domestic Violence*, London, Sage, 2003.

[19] B.C Institute Against Family Violence, *Position Statement on the proposed amendments to the Divorce Act (Bill C-22)*, Vancouver, March 11 2003. See appendix 1

of "different" parenting practices in different communities. Such biases will have a discriminatory impact on their evaluation of what is in the best interests of the child[20]. Studies also indicate that the parenting style of women from marginalized communities is more likely to be contested by child welfare authorities[21]. It is important that decision-makers be encouraged to look at these differences positively, and that a child's culture and heritage be honoured and promoted in all its dimensions. It is also important that a careful approach be taken with regard to a bi-racial child's identity that takes into account the evolving and dynamic self-definition that the child may adopt with respect to her identity, language and community. Culture must be understood in its different contexts, and as a concept that is fluid and whose meaning is sometimes contested by some community members.

Bill C-22 proposes to take into consideration culture, religion and Aboriginal heritage in the determination of the best interests of the child (section 16.2(e)). However, the proposed list falls short of some important aspects of a child's life, such as race and ethnic origin. The Supreme Court of Canada, in the *Edwards* v. *Van der Perre* case has recently recognized that, while it must be examined on a case-by-case basis, "race can be a factor in determining the best interest of the child because it is connected to the culture, identity and emotional well-being of the child"[22]. Further, the issue of Aboriginal heritage or upbringing should appear in its own paragraph and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples and the equality rights of Aboriginal women, as well as the best interests of the specific child affected by a decision.

Finally, there is a risk of possible misinterpretation of these new references to culture, race and Aboriginal heritage. Culture, for example, can be invoked by abusive men to justify oppressive or abusive behaviour or to provide legitimacy to male domination in the family[23]. Some may say, for example, that in their culture, men automatically have custody of the child or that women and girls who have extra-marital sexual relations should be severely punished. The *Divorce Act* must include a provision that will foster an interpretation of culture that takes into account the specific and general context in which culture is experienced by different families, but maintains the value of gender equality as well.

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[20] Susan Boyd, Child Custody, Law, and Women's Work, at 14-15.

[21] M. Touriny and N. Trocmé "Facteurs associés à la décision d'entreprendre des poursuites criminelles à la suite d'un signalement pour abus sexuel ou physique envers un enfant » (2000) 33 Criminologie p.? (check cite).

[22] *Van de Perre* v. *Edwards*, [2001] 2 SCR 1014, at par 40.

[23] Beryl Tsang, *Child Custody and Access: The Experiences of Abused Immigrant and Refugee Women*, Toronto, Education Wife Assault, 2001.

RECOMMENDATIONS:

Improve the Best Interest of the Child Test

8- Section 16.2 of the *Divorce Act* should specify that the issues of safety and security of both the child and her primary caregiver are the paramount concern when deciding on a child's best interests.

9- The circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-making responsibility for the abuser in cases involving family violence must be added to the subsection 16.2 (1) (d).

10- The definition of family violence in subsection 16.2 (3) should specifically mention wife assault or spousal violence, and include "sexual abuse" as well as "psychological abuse," when it entails a prolonged pattern of behaviour intended to control the victim through humiliation, fear or isolation.

11- The provisions on family violence should also identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as is the case in New Zealand and as recently recommended by the B.C. Institute Against Family Violence[24]. In cases involving family violence and where contact with the abuser is still considered in the best interests of the child, supervised access or visits must be provided, and the courts should monitor the protection of the best interests of the child during the supervised contact periods.

12- Supervised access services must be accessible, secure and provided by those with expertise in child abuse and violence against women. Services must be racially, culturally and linguistically appropriate to the diverse families across Canada. The difficulties of providing and organizing supervised access in rural and remote areas of Canada must be recognized and consideration given to providing special funding to the Provinces and Territories to cover the costs of this.

13- The proposed subsection 16.2(2)(e) must be amended to include race and ethnic origin in the list of factors to be taken into consideration to determine the best interests of the child.

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[24] The BC Institute Against Family Violence recommends that risk factors include: "the nature and seriousness of the violence used; how recently the violence occurred; the frequency of the violence; the likelihood of further violence occurring; the physical or emotional harm caused to the child by the violence; whether the other party to the proceedings considers that the child will be safe while the violence party has custody of or access to the child and consents to the violence party having custody or access (other than supervised access) to the child; the wishes of the child, if the child is able to express them, and having regard to the age and maturity of the child; any steps taken by the violent party to prevent further violence occurring; such other matters as the Court considers relevant." Excerpt from Position Statement 2, BC Institute Against Family Violence, March 11, 2003.

14-The reference to Aboriginal heritage should appear in its own paragraph, and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples, the equality rights of Aboriginal women, as well as the best interests of the specific child who is affected by a decision.

III ENSURE WOMEN'S ACCESS TO JUSTICE

Mediation

The current *Divorce Act* requires that lawyers discuss with their client the possibility of reconciliation and inform the client of facilities that might be able to assist such a reconciliation. It also requires that a lawyer mention mediation to a divorcing client. Bill C-22 would mandate lawyers to talk about "other family services known to the barrister." It would seem that a lawyer must mention alternative dispute resolution mechanisms in all cases. No mention of violence or power imbalances, however, is made in this section. Since mediation is not appropriate in cases where a woman has been abused by her partner, or where there is a distinct power imbalance between the parties, an exception to this requirement should be indicated in the section for cases not appropriate for alternative dispute mechanisms such as mediation. In Family Courts where court conciliation services are already in place, a screening mechanism, similar to that which has been adopted in Nova Scotia's Supreme Court Family Division should be provided to identify cases where there is violence or concern about the safety or the emotional, psychological or physical health of the parties. In all cases, even where mediation is an option, Courts should encourage the parties to engage a lawyer to ensure that their interests are represented.

Bill C-22 would also amend subsection 16(6) of the *Divorce Act*, to allow a court to "provide for a dispute resolution process for any or all future disputes regarding parenting arrangements, if the process has been agreed to by the persons who are to be bound by that process." It is worrisome that some women may agree to forego their rights to access the courts in "any or all future disputes." Provisions should be made for protecting the best interests of the child and the security and equality interests of children and their mothers, and the *Divorce Act* should authorize judges to set aside agreements made under the threat of violence or other forms of coercion.

Legal aid

Funding for family law legal aid has been severely curtailed across Canada and does not command the same priority as legal aid for criminal law matters. This imbalance disadvantages primarily women because as a result of their disadvantaged economic status, it is most frequently women who need family law legal aid. Further, women from marginalized communities experience additional poverty, which limits their access to justice even more if legal aid is not adequately funded. Legal aid funding must be increased to ensure that women do not experience gender discrimination within the overall legal aid system.

Education and training

It is important that family court personnel, lawyers, mediators, those involved in parenting education and assessors receive appropriate training on the gender dynamics involved in family law issues and on violence against women and its impacts on children, as well as the cultural and other biases that may influence their decision-making process. The National Judicial Institute should also be encouraged and supported to deliver similar educational programs to the judiciary

Parenting Classes

Parent education attached to the family law process outlining the impacts of separation and divorce on children should screen out cases in which there is woman or child abuse. The programs should also emphasize the impact of child abuse on children and support the right of women to leave abusive relationships.

Funding for services

The federal government has announced that $63 million will be invested in support services in family law over the next five years. Extensive services need to be put in place for screening cases for violence against women and children, training legal professionals and other family law professionals, tools for family court players, women's advocates who can provide safety planning and family court support for women, etc. The amount designed, therefore, is not sufficient to respond adequately to the needs of women and children across all the provinces and territories especially given the likelihood of increased litigation due to the new legislation. The need for increased funding for services such as legal aid, screening and women's advocates, therefore, is considerable.

RECOMMENDATION:

Ensure Women's Access to Justice

15- Mediation must never be mandatory. Where a woman discloses past abuse/control issues, she should not be expected to begin or continue with mediation. A screening mechanism, similar to that which has been adopted in the Nova Scotia Supreme Court Family Division, should be provided to identify cases where there is violence or concern about the safety or the emotional, psychological or physical health of the parties. Mediation should also not be recommended as a form of therapeutic intervention for so-called "high conflict" family law disputes. Participation in mediation or similar alternative dispute resolution process should not be a requirement for receiving legal aid or any community support services related to family law issues.

16- The Divorce Act should continue to recognize that both parties in divorce have a constitutional right to legal information and advocacy by trained lawyers throughout the process if they wish it.

17- Legal aid should be granted to qualified persons where there has been/is the threat of domestic violence. Alternative methods of delivering legal services to women who fall above the current income threshold for legal aid should be investigated, including loans and long-term payment options. Staff involved with legal aid clients and unrepresented litigants should be trained in domestic violence issues.

18- The Federal government, however, must provide adequate funding for legal aid to the Provinces and Territories for family law matters and must ensure that provinces and territories use this money as intended.

19- Family court personnel, lawyers, mediators and other professionals involved in or advising on ADR processes, parent education or child assessments must receive mandatory training in the new legislation that also includes training on the realities and dynamics of family violence and its affects on women and children.

20- The National Judicial Institute should be encouraged and supported in delivering appropriate educational programs and resources to the judiciary on the Act, and the many associated issues referenced above.

21- The Federal government must invest more than is currently planned in support services in family law, the training of legal and family court professionals and the development of screening and other tools related to family violence, safety planning and family court support for women.

IV PROTECT WOMEN'S EQUALITY RIGHTS IN THE IMPLEMENTATION OF THE *DIVORCE ACT*

Women's realities are not visible in Bill C-22

It is of great concern that there is no reference in Bill C-22 to women's historic and ongoing inequality and disproportionate responsibilities for childcare in the family, and that the Bill is couched in "gender-neutral" terms such as "parenting responsibilities" and "family violence". While the parental responsibility model appears to be neutral and does not create a formal presumption in favour of joint custody or shared parenting, in its interpretation and application women will likely have to contend with a basic expectation that parenting time and/or decision-making authority should be shared with their ex-spouses. Indeed, research shows that joint custody and shared or 'parallel' parenting are already becoming the preferred models for parenting after divorce on the part of some judges, lawyers and other family law professionals. Statistics Canada indicates that 37 per cent of all court orders relating to custody and access now mandate joint custody of the

children[25]. A recent report in the National Post also notes that some judges in Ontario are adopting "parallel parenting" in order to "get a jump on proposed changes to the Divorce Act."[26]

Rather than simply being motivated by the best interests of the child, however, these trends may also reflect pressures now placed on parents and the legal profession in the context of fathers' rights groups, the impact of the 40% rule on the child support guidelines, the growth of the mediation profession, and the favourable reception by some judges and mediators of the shared parenting ideas in the Report of the Special Joint Committee on Custody and Access. These somewhat idealised preferences, however, must be offset and balanced with the realities of women's disproportional responsibilities for primary caregiving, their ongoing inequality in society and the true best interests of the child.

If legislation and policy do not acknowledge the social and economic realities of women's lives, the end result will be legislation that *appears* equitable, but that in reality reinforces women's dependence and subordination vis-à-vis their spouses, as well as threatens their security, their dignity and their freedom. This result is also contrary to the best interests of their children.

Canada's commitment to women's equality and gender-based analysis

The gender neutral approach in Bill C-22 is contrary to the Canadian government's commitments to promote women's equality and to ensure gender equality in all of its policies and programs through gender-based analysis and evaluation of the impact of laws and policies on women[27]. Internationally, Canada endorsed the *Beijing Platform for Action* ("PFA") that, amongst other things, calls on governments to "seek to ensure that before policy decisions are taken, an analysis of their impact on women and men, respectively, is carried out"[28].

The Supreme Court of Canada's concern for women's equality in family law

In addition, the *Canadian Charter of Rights and Freedoms* and Supreme Court of Canada jurisprudence have established that the constitutionality of legislation must be evaluated by its impact on historically disadvantaged groups, and in particular on women. Legislation will be deemed discriminatory if it has the effect of exacerbating pre-existing disadvantage, depriving these groups of equal protection or equal benefit of the law. The Supreme Court of Canada has indeed recognized that marriage often reinforces women's inequality (for example *M v. H*[29] and *Moge v. Moge*[30]). As Justice L'Heureux-Dubé wrote in

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[25] Joseph Brean, "Joint custody on the rise in divorce settlements, Statistics Canada finds most marriages likely to fall apart after four years", National Post December 3, 2002.
[26] National Post, July 21, 2003.
[27] Status of Women Canada, (1995), *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa, SWC, par. 35
[28] United Nations, Report of the Fourth World Conference on Women, Beijing, China, 4-15 September 1995, A/CONF.177/20, 17 October 1995, Beijing Platform for Action.
[29] *M. v. H.*, [1999] 2 S.C.R. 3, at par. 181.

Willick, the *Divorce Act* must be interpreted in a way that is "*sensitive to equality of result as between the spouses*"[31]. More specifically, Justice L'Heureux-Dubé wrote in *Young*:

> *When implementing the objectives of the Act, whether considering joint custody or fashioning access orders, courts, in my view, must be conscious of the gap between the ideals of shared parenting and the social reality of custody and childcare decisions…. Research uniformly shows that men as a group have not embraced responsibility for childcare. The vast majority of such labour, both before and after divorce, is still performed by women, whether those women work outside the house or not, and women remain the sole custodial parent in the majority of cases by mutual consent of the parties. … Nor does a joint custody order in most cases result in truly shared custody. Rather in day-to-day practice, joint custody tends to resemble remarkably sole custody…* [32].

Governments' commitments to prevent violence against women and children

International instruments such as the Declaration on the Elimination of Violence against Women and the Beijing Platform for Action as well as domestic commitments such as the Iqualuit Declaration of the Federal-Provincial-Territorial Status of Women Ministers on Violence Against Women, recognize women's vulnerability to violence in the family and have made various commitments to promote strategies to prevent it.

A reporting mechanism to ensure accountability

A mechanism for monitoring the interpretation and the application of the *Divorce Act* provisions and its impacts on women and on children should be put in place. Precedent exists for such a mechanism, for example, the *Immigration and Refugee Protection Act* provides for an annual report to Parliament that must include "a gender-based analysis of the impact of this Act"[33].

RECOMMENDATION:

Recommendation: Protect women's equality rights in the implementation of the *Divorce Act*

22- A specific provision should be included mandating an annual report to Parliament on the application of the *Divorce Act* that specifically directs the Department of Justice to conduct a gender-based analysis of the impact of the Act on women.

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[30] *Moge v. Moge*, [1992] 3 .C.R. 813, at par. 47 and 70, respectively.
[31] *Willick v. Willick*, [1994] 3 S.C.R. 670, at par. 52.
[32] *Young v. Young* [1993] 4 S.C.R. 3, at par 46.
[33] IRPA, section 94f).